Supreme Court, U.S.
FILED

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No. ——

IN THE

Supreme Court of the United States

TA OPERATING CORPORATION,
d/b/a TravelCenters of America,
Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Commerce Clause of the United States Constitution require that a state taxing the full and unapportioned value of transactions in interstate commerce provide taxpayers a credit for taxes paid on the same goods in other jurisdictions?

2. Does the Commerce Clause of the United States Constitution require a state to have nexus with the taxpayer, in addition to nexus with the transaction, in order to tax a transaction in interstate commerce?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 14.1(b) and 29.6, the following list identifies all of the parties to the appellate proceeding in the District Court of Appeal of Florida, First District, whose judgment and opinion are sought to be reviewed.

Appellant below: TA Operating Corporation, formerly d/b/a Truckstops of America, now d/b/a TravelCenters of America. The parent company is TravelCenters of America, Inc. No publicly held company owns 10% or more of TA Operating's stock.

Appellee below: Florida Department of Revenue.

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FLORIDA DEPARTMENT OF REVENUE,
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On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

PETITION FOR WRIT OF CERTIORARI

Petitioner TA Operating Corporation, d/b/a TravelCenters of America, respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the District Court of Appeal of Florida, First District, denying TA Operating a refund of Florida excise taxes paid on diesel fuel immediately exported to Georgia, despite the fact that TA Operating had absolutely no presence in Florida and paid Georgia's excise taxes on the same fuel without receiving a credit against the Florida taxes.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, First District, reported at 767 So. 2d 1270 (Fla. Dist. Ct. App. 2000), is set forth in Appendix A. The order of the Supreme Court of Florida declining review is set forth in Appendix B. The judgment entered by the Circuit Court in and for Leon County, Florida, is set forth in Appendix C.

JURISDICTION

The District Court of Appeal of Florida, First District, issued its opinion on September 28, 2000, rejecting Petitioner's claim under the Commerce Clause of the United States Constitution that Petitioner was entitled to a refund of Florida excise taxes it paid on diesel fuel pumped directly from the loading rack at a terminal in Florida into a common carrier's tanker trucks, and exported immediately to Georgia for resale, where Petitioner also paid Georgia's excise taxes on the same fuel. Petitioner timely filed a petition for discretionary review in the Supreme Court of Florida. The Supreme Court of Florida denied the petition on April 27, 2001. Therefore, the jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause of the United States Constitution, the pertinent portion of which is set forth below:

> The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States.

U.S. CONST. art. I, § 8, cl. 3.

This case also involves several Florida statutes, which are set forth in Appendix D. They are Florida Statutes § 206.87 (West 1993), which imposes an excise tax of 4 cents per gallon on the first sale or transfer of title in the State of special fuel used or sold for use in Florida (App. 21a); Florida Statutes § 206.86(1) (West 1993), which defines "special fuel" to include the diesel fuel at issue here (App. 21a); and Florida Statutes § 206.86(5) (West 1993), which defines "use" of fuel as placing it into a receptacle on a motor vehicle for propulsion of that vehicle (App. 22a).

STATEMENT OF THE CASE

This Petition seeks review of a Florida court decision denying Petitioner a refund of Florida fuel excise taxes[1] imposed on Petitioner's purchase of diesel fuel from a terminal in Florida for immediate export via common carrier to Georgia, where Petitioner paid Georgia's full excise taxes on the same fuel.

TA Operating owns a nationwide network of truckstops that sell gasoline and diesel fuel at retail. App. 2a. n.1. At all times pertinent to this case, TA Operating had ***no*** place of business in Florida, ***no*** personnel in Florida, ***no*** sales in Florida, and ***no*** license for retail sale of diesel fuel in Florida. *Id.* at 2a. TA Operating owned a truckstop in Brunswick, Georgia, for which the nearest wholesale fuel terminal was in Jacksonville, Florida. TA Operating purchased diesel fuel from the Jacksonville terminal facility, pursuant to contracts providing that title to the fuel passed in Florida. The fuel was pumped from the terminal loading rack directly into a common carrier's tanker trucks,[2] which transported the fuel

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[1] The excise tax of four cents per gallon on diesel fuel used or sold for use in Florida was imposed on the first sale or transfer of title in the state. Fla. Stat. § 206.87(1) (West 1993) (App. 21a). *Id.* The state statute recognized exemptions from the tax if required by the United States or Florida Constitutions. Fla. Stat. § 206.87(3) (West 1993) (App. 21a). TA Operating claimed, among other things, that the sales at issue were exempt from the tax under the Commerce Clause of the United States Constitution.

[2] The logistics of this transaction repeat themselves around the clock and around the country, and involve their own vernacular. Tanker trucks, usually having a capacity of 8700 gallons of fuel each, drive onto a platform under what is called a 'loading rack,' a mechanism through which fuel from a refiner's or wholesaler's large storage tank or pipeline is pumped into the truck's storage tank for transportation (***not for propulsion of that vehicle***). The facility at which this occurs may be called a 'terminal' or sometimes more loosely a 'tank farm.' Thus, in the vernacular the price charged for the fuel at this point is a 'rack price,' and

immediately over the state line to TA Operating's truckstop in Brunswick, Georgia. *Id.*

TA Operating paid both a Florida excise tax on the entire volume of the diesel fuel purchased, and a Georgia excise tax on the entire volume of the same fuel as it was sold to consumers in Georgia. *Id.* Florida's taxing scheme did not provide a credit for taxes paid on the same fuel in other jurisdictions. *Id.* Therefore, TA Operating sought a refund of the Florida taxes, raising the Commerce Clause questions in its complaint in state circuit court; again in its initial and reply briefs on appeal to the District Court of Appeal of Florida, First District; and again in its brief on jurisdiction attempting to obtain the discretionary review of the Supreme Court of Florida. Each Florida court rejected Petitioner's arguments. App. 1a, 16a, 17a.

The Florida trial court rejected Petitioner's claim on the grounds that Petitioner's failure to hold a Florida license as a dealer in special fuels was an absolute bar to any constitutional protections otherwise afforded by the Commerce Clause. App. 18a. The District Court of Appeal of Florida, First District, rejected that reasoning, but nevertheless affirmed the refund denial on the grounds that Florida's tax satisfied each of the four Commerce Clause requirements this Court established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977): (1) substantial nexus, (2) fair apportionment, (3) lack of discrimination against interstate commerce, and (4) fair relationship to services provided by the state. 430 U.S. at 279. The Florida court arrived at its conclusion that the Commerce Clause did not require Florida to provide a credit for taxes paid on the same fuel in other jurisdictions by shrugging off a contrary decision of this Court with no more than the negative introductory signal "*but see*." App. 11a

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a state's tax on this transaction is imposed 'at the rack,' or is called a 'rack tax.' *See, e.g., E.S. Bills, Inc. v. Tzucanow*, 194 Cal. Rptr. 343, 345 n.1 (1983) (explaining terminology).

(citing *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 166-67 (1954)). The Florida court also announced that the law did not require Florida to have any nexus whatsoever with TA Operating in order to impose the tax. App. 8a. The Supreme Court of Florida declined to exercise its discretionary jurisdiction to review the case. App. 16a.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari for two reasons. First, the decision below conflicts with this Court's own decisions on issues that are fundamental and important to Commerce Clause jurisprudence. Far from merely disagreeing with Petitioner on the application of the law to the facts at bar, the Florida court departed from this Court's precedents and announced incorrect rules of law both with respect to the internal consistency aspect of the fair apportionment test, and with respect to the substantial nexus test, of *Complete Auto Transit*. Whereas this Court has made it clear that the internal consistency test requires a *hypothetical* replication of the tax scheme in every state to determine whether the danger of impermissible multiple taxation exists, *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184-85 (1995), the Florida court refused to engage in that hypothetical analysis after concluding summarily that the taxable event could not *actually* be replicated in every state. App. 10a-11a. Further, whereas this Court has made it clear that a taxing state must have substantial nexus with the taxpayer *in addition to* substantial nexus with the transaction, *Quill Corporation v. North Dakota*, 504 U.S. 298, 306 (1992), the Florida court announced that "No additional taxpayer nexus requirement exists." App. 8a. The Florida court's decision thus reflects fundamental errors of law justifying issuance of the writ and reversal of the decision below.

The Florida court's erroneous analysis in *TA Operating* creates confusion in this Court's Commerce Clause jurisprudence, upon which Florida and other taxing jurisdictions

may be only too eager to capitalize. *See, e.g.*, Shop Talk: *Florida Special Fuels Excise Tax Upheld Against Commerce Clause Challenge*, 11-Mar. J. Multistate Tax'n 38 (2001) (noting that the Florida court in *TA Operating* departed from this Court's precedents and evaded TA Operating's argument on the taxpayer nexus question in particular). A state's attempt to tax an out-of-state taxpayer raises the threshold constitutional question of whether the state has that authority at all. *See Quill*, 504 U.S. at 306-08. The question of the existence of the power to tax, and Commerce Clause limitations on that power, are of constant and considerable importance nationwide to taxpayers and taxing authorities alike, yet the myriad factual scenarios of practical application often spawn confusion. The greater the clarity and force of the jurisprudence, the better protected are taxpayers' rights, and the better delineated are taxing authorities' obligations. This case presents simple and undisputed facts that create an excellent vehicle for making clear the critical nuances of Commerce Clause protections in an area of the law that has been, and will remain, of recurring interest throughout the country. Accordingly, the Court should grant the writ and reverse the judgment of the Florida court.

The second reason the Court should grant the writ is that the Florida court's decision represents yet another instance in which the Florida courts have subrogated taxpayers' constitutional rights to the State's desire to retain unlawful tax revenues. This Court repeatedly has admonished the Florida courts to comply with federal constitutional provisions mandating taxpayer relief from unlawful taxes, but the Florida courts repeatedly devise creative avoidances, which for the most part evade higher scrutiny.

Among other cases illustrating Florida's propensity to resist refunding unlawful taxes is *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). In *McKesson*, this Court noted that the tax at issue

was virtually identical to a tax this Court had found unconstitutional in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), having been changed only cosmetically in response to *Bacchus*. *McKesson*, 496 U.S. at 20. The Supreme Court of Florida had acknowledged that the taxes at issue were unconstitutional, but refused to require the State to refund the taxes already paid. This Court ordered retrospective relief. 496 U.S. at 22.

The District Court of Appeal of Florida, First District (the same court whose decision is at issue here) subsequently refused to enforce a taxpayer's right to a refund of unlawful taxes because the taxpayer had not utilized a refund procedure recognized for the first time in that very decision. *Newsweek, Inc. v. Department of Rev. of Fla.*, 689 So. 2d 361 (Fla. Dist. Ct. App. 1997). The Florida Supreme Court declined to review the case, as it did here. Upon Newsweek's petition for writ of certiorari, this Court summarily reversed, instructing the Florida courts to allow Newsweek to utilize existing refund procedures. *Newsweek, Inc. v. Department of Rev. of Fla.*, 522 U.S. 442, 442 (1998) (noting rather euphemistically that the Florida court "failed to consider" this Court's decision in *Reich v. Collins*, 513 U.S. 106 (1994)).

The ink was scarcely dry on this Court's summary disposition of *Newsweek* when the Florida courts denied the refund at issue in this case, culminating in the Florida District Court of Appeal's dismissal with a bare "*but see*" signal this Court's analogous and controlling decision in *Michigan-Wisconsin Pipe Line*. App. 11a. The problem persists in Florida, and justifies this Court's decisive intervention.

ARGUMENT

Although Petitioner will demonstrate on the merits that the Florida court erred under each of the four prongs of the *Complete Auto Transit* test, discussion of only two of those prongs is sufficient to demonstrate conflict between the

Florida decision and this Court's Commerce Clause precedents. First, the taxing scheme at issue violates the internal consistency component of the fair apportionment prong, because if the tax hypothetically were replicated in every state, impermissible multiple taxation would result. The Florida court dodged this issue by concluding summarily that because as a practical matter the exact transaction that Florida taxed *could not* reoccur in every state, there was no need to consider this test and no violation of the Commerce Clause. App. 10a. Second, the Florida court made the bald assertion that once it was established that Florida had nexus with the transaction at issue, it was not necessary to establish taxpayer nexus with Florida: "No additional taxpayer nexus requirement exists." App. 8a. Both of these errors of law are patent and should not be left to muddy the waters of this Court's carefully enunciated Commerce Clause jurisprudence. The Court should grant the writ and reverse the judgment of the District Court of Appeal of Florida, First District.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING A CREDIT MECHANISM TO ENSURE FAIR APPORTIONMENT OF TAXES IMPOSED ON INTERSTATE COMMERCE, AND SHOULD BE REVERSED.

This Court's decision in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954), involved facts that cannot be distinguished in any material way from those presented here, and reached the diametrically opposite conclusion about whether the tax at issue was fairly apportioned. This anomalous result cannot be explained by any change in the governing law, because the year after issuing its landmark Commerce Clause decision in *Complete Auto Transit*, this Court confirmed that *Michigan-Wisconsin* was still good law. *Department of Rev. v. Association of*

Washington Stevedoring Cos., 435 U.S. 734, 749 n.18 (1978) ("Today's decision does not question the *Michigan-Wisconsin* judgment, because Washington apportions its . . . tax to activity within the State. Taxes that are not so apportioned remain vulnerable to Commerce Clause attack."). Yet, despite TA Operating's heavy reliance on that decision, the Florida District Court of Appeal here dismissed *Michigan-Wisconsin* with no discussion, no analysis, no attempt at distinction; nothing but a "*but see*" signal,[3] as if this Court's precedents deserve no deference and afford taxpayers no protections.

In *Michigan-Wisconsin Pipe Line*, this Court invalidated a Texas tax assessed against an interstate gas pipeline company upon "gathering" natural gas from the outlet of an independent gasoline plant within the state, for immediate interstate transmission. 347 U.S. at 161. A Texas statute defined the taxable activity of "gathering gas" to mean the first taking or first retaining of possession of the gas after it passed through the outlet of the plant. *Id.* The taxpayer purchased the gas for sale in other states, but did not sell gas in Texas. *Id.* at 162. Texas law did not offer a credit for taxes paid in other states. *Id.* at 161, 164, 170 (tax was levied on entire volume of gas, in addition to all other state taxes and licenses, creating possibility that every state through which the gas subsequently passed would likewise tax the full volume).

This Court rejected the Texas court's attempt to characterize the "gathering" of gas from the plant outlet as a "local activity" not subject to repetition elsewhere. 347 U.S. at 164-65. The Court struck down the tax because it would have fostered multiple tax burdens if other states asserted an

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[3] Under Rule 1.2 of *The Bluebook: A Uniform System of Citation* (17th ed. 2000), in effect when the decision below was penned (prescribed by Fla. R. App. P. 9.800(n)), this signal indicates obvious contradiction: 'Cited authority *clearly* supports a proposition contrary to the main proposition.' *Bluebook* at 23 (emphasis added).

equal right to tax the first taking or unloading of the same gas from the pipeline when it arrived for distribution: "The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate." *Id.* at 170.

The Florida court's decision in *TA Operating* thus conflicts with *Michigan-Wisconsin Pipe Line* on the requirement that a tax be fairly apportioned. The Florida decision also conflicts with a very recent decision of the Court of Appeals of New York, concluding on analogous facts that the state tax violated the fair apportionment requirement by failing to provide a credit. *Tennessee Gas Pipeline Co. v. Urbach*, 96 N.Y.2d 124 (2001). The fair apportionment requirement is intended to ensure that each state taxes only its fair share of an interstate transaction and does not tax interstate activities carried on outside the state. *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989); *American Trucking Assoc. v. Scheiner*, 483 U.S. 266, 283 (1987) (fuel consumption tax used as an example of an internally consistent tax because it was apportioned based only on in-state use of the fuel). This principle derives from the dormant Commerce Clause's historical prohibition of multiple taxation, which is "threatened whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of the value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it." *Jefferson Lines*, 514 U.S. at 185 (citing *Western Live Stock v. Bureau of Rev.*, 303 U.S. 250 (1938)).

Fair apportionment is measured by internal consistency and external consistency. *Goldberg*, 488 U.S. at 261. Internal consistency asks whether hypothetical application of the same tax by every state would place interstate commerce at a disadvantage compared to intrastate commerce, and thus impermissibly interfere with free trade. *Jefferson Lines*, 514 U.S. at 185; *Tyler Pipe Indus., Inc. v. Washington Dept. of*

Rev., 483 U.S. 232, 247 (1987). External consistency asks whether a state has taxed only that portion of the revenue from interstate activity that is fairly attributable to activity within the taxing state. *Id.* The internal consistency test is at issue here.

As was the case with the natural gas in *Michigan-Wisconsin Pipe Line*, it is undisputed here that all of the diesel fuel at issue was pumped directly from storage tanks at the terminal facility into the common carrier's trucks and shipped immediately out of state for resale in Georgia. App. 1a-2a. TA Operating had no personnel in Florida, operated no Florida location, made no sales in Florida, and was not licensed as a Florida dealer. *Id.* at 2a-3a. TA Operating paid Florida's excise tax on the entire volume of fuel, and then also paid Georgia's excise tax on retail sales of the entire volume of fuel. *Id.* at 2a. Florida law imposed the tax on the first sale or transfer of title in the state. Fla. Stat. § 206.87(1) (West 1993) (App. 21a). Florida's tax scheme did not offer a credit for taxes paid in other jurisdictions.

Like the Texas tax invalidated in *Michigan-Wisconsin Pipe Line*, the Florida tax at issue is invalid because it violates the internal consistency requirement. Like the Texas tax, the Florida tax here was imposed on the first sale or transfer of title to fuel in this state. Fla. Stat. § 206.87(1) (1993); App. 21a. As in *Michigan-Wisconsin Pipe Line*, the "first sale or transfer of title" to fuel could legitimately be (and in this case was) replicated in other states that had an equal right to tax the same fuel. 347 U.S. at 170. The Florida tax was imposed on the entire volume of fuel purchased just like the Texas tax. There being no valid basis to distinguish this case from *Michigan-Wisconsin Pipe Line*, the Florida court erred in dismissing it with a "*but see*" signal. The Florida tax was invalid under *Michigan-Wisconsin Pipe Line*.

Florida's special fuel tax scheme violated the central protective tenet of the Commerce Clause by unfairly

burdening interstate commerce in comparison to in-state activities. Florida's tax scheme taxed the first sale or transfer of title to fuel in the state, but allowed no credit for taxes paid on the same fuel purchased in another state. Hypothetically replicating that scheme as required under the internal consistency test, each other state would likewise tax the first sale or transfer of title to fuel in that state without allowing a credit for taxes paid in another state. The impermissible burden on interstate commerce is clear: fuel purchased in one state and sold in another would be taxed twice (once on the "first sale" in each state), while fuel purchased and subsequently sold in a single state would be taxed only once (again, only on the "first sale"). For example, a Florida taxpayer could have purchased the same diesel fuel at the same terminal, paying Florida's tax on this "first sale or transfer of title," and subsequently sold the fuel at an in-state location without incurring any additional tax liability. Because the Florida tax is imposed only at the point of "*first* sale or transfer of title," once the tax is paid at the terminal rack no further taxes are imposed on subsequent in-state dispositions of the fuel. Interstate commerce pays tax twice on two sales, while intrastate commerce pays tax once on two sales. Interstate commerce is thus placed at a disadvantage compared to intrastate commerce, and the Florida tax therefore violates the internal consistency test.

When hypothetically replicated in other states, as required under the internal consistency test of *Complete Auto Transit*, the Florida tax scheme impermissibly subjected TA Operating's purchases of fuel to multiple taxation. This specter of multiple taxation is the very evil that led to invalidation of the Texas tax in *Michigan-Wisconsin Pipe Line*. The Florida court, however, misapprehended the requisite analysis, concluding that the precise Florida taxable event at issue (initial passage of title at the terminal rack) *could not* be replicated in other states, and therefore apportionment was not required. App. 10a. This superficial analysis does not

comport with the statute. The tax was imposed on the "first sale or transfer of title," not on the "first sale or transfer of title at a terminal rack in this state." It is possible for every state to host a "first sale or transfer of title" within its jurisdiction as the fuel passes through interstate commerce. The lower court in *Michigan-Wisconsin Pipe Line* made exactly this same analytical error, which this Court rejected. 347 U.S. at 164.

Further, the Florida court completely failed to recognize this Court's requirement that the internal consistency test for fair apportionment be based on a *hypothetical* replication of the tax in every state. A reviewing court must undertake that analysis, not merely conclude that it could never happen in real life and thus need not be considered. *Jefferson Lines*, 514 U.S. at 185 ("This test asks nothing about economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate."); *Tyler Pipe*, 483 U.S. at 247; *Tennessee Gas*, 96 N.Y.2d at 134 ("there is no 'as applied' escape hatch from" the hypothetical test required by the internal consistency requirement). The Florida court here erred in announcing that it was not required to apply this Court's internal consistency test, an exercise that readily would have demonstrated that Florida's taxing scheme violated the fair apportionment requirement of *Complete Auto Transit*.[4]

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[4] The Florida court also argued that Florida need not provide a credit mechanism because the Georgia tax was a 'use' tax, which, according to the Florida court, is subordinate to Florida's 'sales' tax, forcing Petitioner to look solely to Georgia for a refund. App. 10a & n.4. The Court of Appeals of New York has very recently rejected this attempted distinction for Commerce Clause purposes. *Tennessee Gas*, 96 N.Y.2d at 132-33. The Florida court's attempt to create a novel Commerce Clause distinction between sales and use taxes led the court into its erroneous conclusion

The constitutional infirmity could have been cured if Florida's taxing scheme had afforded a credit for taxes paid on the same goods in another state, but it did not. The lack of a credit in Florida's taxing scheme distinguishes this case from those in which this Court has been persuaded to uphold a tax because a credit mechanism satisfied the fair apportionment test. *See, e.g., Jefferson Lines*, 514 U.S. 192 & n.6 ("[We] have often pointed to the concomitant credit provisions for taxes paid out of state as supporting our conclusion that a particular tax passed muster because it treated out-of-state and in-state taxpayers alike."); *Goldberg*, 488 U.S. at 264 ("the credit provision contained in the [t]ax [a]ct operates to avoid actual multiple taxation"). Other courts continue to recognize the requirement of a credit mechanism to ensure fair apportionment. *See, e.g., Tennessee Gas*, 96 N.Y.2d at 134 (invalidating New York tax on imported gas because it "contains no credit for taxes assessed on the purchase of gas out-of-State" and thus an impermissible double tax occurs); *General Motors Corp. v. Denver*, 990 P.2d 59, 71 (Colo. 1999) (invalidating tax lacking credit for taxes imposed by other jurisdictions). The Florida tax was not apportioned, and the lack of a credit is fatal to the tax.

The Florida District Court of Appeal opined, without citing any authority, that if TA Operating wanted a credit, it must seek one from Georgia instead. App. 10a n.4. This glib denial begs the very question of internal consistency, which asks whether the tax would be valid if Georgia and every other state refused to afford a credit just as Florida refused it. The fact that Florida's tax was imposed first on this fuel does not

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that it need not undertake the hypothetical replication of the tax for purposes of the internal consistency analysis. Further, the reasoning rested on faulty facts; even the Florida court in its own statement of the facts correctly stated that 'Georgia *sales* taxes were paid' on the fuel. App. 2a (emphasis added). Both fuel taxes were excise taxes. Fla. Stat. § 206.23 (West 1993); Ga. Code Annot. § 48-9-3 (1993).

give Florida any superior right or primacy to elevate its tax over any other state's tax. This Court in *Michigan-Wisconsin Pipe Line* invalidated the Texas tax first imposed on natural gas entering interstate commerce, because the tax infringed the right of other states to tax the same fuel on later parts of its interstate journey. 347 U.S. at 166.[5] In this additional respect, the Florida court's decision conflicts with this Court's decision in *Michigan-Wisconsin Pipe Line*. The Court has stated that it acts "as a defense against state taxes which . . . attempt to capture tax revenues that ... belong of right to other jurisdictions." *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 386 (1991). Florida's imposition of an unapportioned excise tax on the full volume of diesel fuel purchased by a taxpayer with no nexus to Florida, for immediate export to and resale in Georgia, infringes on Georgia's right to capture the tax revenues from its own in-state taxpayer. TA Operating had every right to expect Florida to be the jurisdiction to refund this tax. The Court should grant the writ and reverse the judgment of the Florida District Court of Appeal.

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[5] In an isolated case, the Supreme Court of Wyoming concluded in *State v. Sinclair Pipeline Company*, 605 P.2d 377 (1980), that the Multistate Tax Compact allowed a first taxing state to claim primacy, relegating to subsequent taxing jurisdictions the obligation to provide credits. 605 P.2d at 379. *Sinclair*, however, was simply an interpretation of the Wyoming statute adopting the Multistate Tax Compact, which is not a constitutional imperative but merely an agreement between member states. *Sinclair* is thus not governing here, because Florida is not a member of the Compact. *See* Fla. Stat. § 213.15-213.18 (West 1975) (repealed by 1976 Fla. Laws ch. 76-149, § 1).

II. THE DECISION BELOW SQUARELY CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING TAXPAYER NEXUS IN ADDITION TO TRANSACTION NEXUS FOR TAXES IN INTERSTATE COMMERCE, AND SHOULD BE REVERSED.

As the Florida court acknowledged, TA Operating had absolutely no physical presence in Florida when it purchased this fuel: no offices, no personnel, no sales, no diesel fuel tax license. App. 2a. TA Operating merely hired a common carrier to transport the fuel to Georgia from the terminal facility in Jacksonville, Florida. *Id.* Despite TA Operating's lack of any substantial physical presence, the Florida District Court of Appeal held that nexus was satisfied because the sale (transfer of title or possession to the fuel) occurred in Florida and because, in that court's view, "no additional taxpayer nexus requirement exists." *Id.* at 8a.[6]

The Florida court's construction of the Commerce Clause as not requiring taxpayer nexus is contrary to this Court's own prior precedents clearly construing the Commerce Clause to impose just such a requirement. *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992) ("substantial nexus" prong of *Complete Auto Transit*). For an excise tax on the sale of goods, this Court has required that the *taxpayer* itself have a *substantial* physical presence in the taxing state. 504 U.S. at 306; *see also, National Bellas Hess, Inc. v. Illinois Dept. of Rev.*, 386 U.S. 753 (1967). The "slightest presence" of a taxpayer in the state will not satisfy the substantial nexus

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[6] The Florida court also suggested that TA Operating occupied a position analogous to that of the customers in the mail order sales cases. App. 8a. That reasoning ignores the undisputed fact that TA Operating had no presence in Florida and merely purchased the fuel for resale in Georgia, *id.* at 2a, a fact having the same legal effect as the facts upon which this Court relied in *Michigan-Wisconsin Pipe Line* to invalidate the Texas tax. 347 U.S. at 162.

requirement. *Quill*, 504 U.S. at 315 n.8. And this Court's "safe harbor" rule of *Quill* and *Bellas Hess* establishes that the use of a common carrier does *not* establish taxpayer nexus. *Quill*, 504 U.S. at 311-12; *Bellas Hess*, 386 U.S. at 758.

In *Quill*, this Court held that where a taxpayer's only physical contact with the taxing state was having a common carrier or the United States Postal Service transport the taxpayer's goods to purchasers in the state, substantial nexus over the taxpayer ***did not exist.*** 504 U.S. at 301. In that case, title to the goods transferred upon delivery to the purchaser, meaning that the seller had title to the goods while they were being transported in the taxing state. *Id.* at 302 n.1. Likewise, in the case at bar, TA Operating obtained title to the fuel as it passed into the common carrier's trucks from the terminal rack. App. 2a. The Florida court, however, concluded that passage of title to TA Operating in Florida created sufficient taxpayer nexus to justify the tax, App. 8a, even though this Court held in *Quill* that the taxpayer's holding title was *not* sufficient nexus to justify the tax. 504 U.S. at 302 & n.1. The Florida court, rather than focusing on the taxpayer, attempted to analogize TA Operating to the mail order *customers* in *National Bellas Hess* and *Quill*, who of course had nexus with the taxing state because they lived there and were receiving their mail and goods there. The Florida court missed the point of these cases that taxpayer nexus is required in addition to transaction nexus, and was flat wrong to assert that taxpayer nexus is not required under the Commerce Clause. App. 8a.

The Florida District Court's construction of the Commerce Clause as not requiring taxpayer nexus is plainly at odds with this Court's construction of the Commerce Clause. "The constitutional question in a case such as *Quill Corp.* is whether the State has the authority to tax the corporation at all." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504

U.S. 768, 778 (1992). The conflict between the decision of the Florida Court in *TA Operating*, and this Court's precedents in *National Bellas Hess* and *Quill*, militates strongly in favor of this Court's granting the requested writ and reversing the judgment of the Florida court.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the judgment of the Florida court.

Respectfully submitted,

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July 26, 2001